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Villa Highlands, LLC v. Western Community Ins. Co. Respondent's Brief Dckt. 35472

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VILLA HIGHLANDS, LLC, an Idaho limited liability
company,

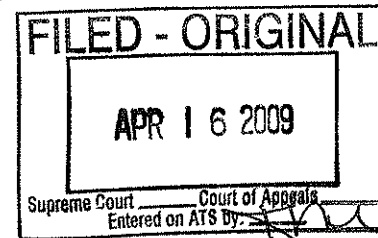
Plaintiff-Appellant,

v.

WESTERN COMMUNITY INSURANCE CO., an
Idaho corporation; FARM BUREAU INSURANCE
COMPANY OF IDAHO, an Idaho corporation; DALE
E. ZIMNEY, an individual; and DOES I-V,,

Defendants- Respondents,

Docket No.: 35472



RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the
County of Ada

Honorable Darla Williamson, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of The Case

This case arises out of a dispute regarding an insurance claim filed by the Appellant, Villa Highlands, LLC (“Villa Highlands”) under its builder’s risk insurance policy with Western Community Insurance Company (“Western Community”) after the Villa Highlands building was destroyed by fire in May 2006. While Villa Highlands originally asserted a number of claims against Western Community with regard to the manner in which Western Community investigated and adjusted the insurance claim at issue, by the time of trial the issues were significantly narrowed such that the only issue tried by Villa Highlands was whether Western Community was vicariously liable for its insurance agent’s alleged negligent failure to ensure that that Villa Highlands building was adequately insured.

The case proceeded to trial, with the jury finding that Western Community’s insurance agent was not negligent. Therefore, Western Community was not found liable on the basis of vicarious liability. These issues are not before the Court on appeal. Rather, the Court is being asked to reverse certain pre-trial rulings made by the trial court related to procedural matters, the scope of the pleadings and the dismissal of Villa Highlands’ breach of contract and declaratory judgment claims against Western Community.

B. Statement Of The Facts

1. Objection to Villa Highlands' Statement of Facts

Western Community objects to Villa Highlands' Statement of Facts because it contains information irrelevant to this appeal, mischaracterizes the record, contains unsupported assertions that are contrary to the record, and obfuscates the proper chronology of events. For example:

a. Appellant attempts to infer that the sole cause of its underinsuring the Villa Highlands building was due to Western Community's insurance agent, Dale Zimney, advising Appellant to rely upon the hard costs contained in the original construction budget to determine the amount of coverage for the policy. *Appellant's Brief*, p. 1. Respondent would note that the reasons as to why the Villa Highland building was inadequately insured by the Appellant is not an issue currently before the Court on appeal. Rather, this appeal is concerned with the manner in which the insurable loss was calculated by Western Community pursuant to the insurance policy, as well as the interpretation of several policy provisions.

2. Course of Proceedings

Plaintiff Villa Highlands is a company which was organized for the purposes of providing an independent living community for the elderly. R., p. 171, *Second Amended Complaint*, ¶ 1. The Villa Highlands building began construction in 2005 and was designed as a three story, fifty-unit facility located at the Northwest Corner of 15th Street and Hill Road in Boise, Idaho. *Id.*, ¶ 6. Western Community Insurance Company is an Idaho corporation licensed to issue policies of insurance in the state of Idaho. *Certificate of Exhibits* ("COE"), Exh. 11, *Affidavit of Richard Peterson* ("Peterson Aff."), ¶ 3.

In early April 2005, Bill Hodges, the principal of Villa Highlands, met with Dale Zimney, an insurance agent authorized to sell insurance for Farm Bureau and Western Community, to discuss builder's risk insurance for the Villa Highlands project. *See COE*, Exh. 12, *Affidavit of Robert A. Anderson* ("Anderson Aff."), Exh. A, *Hodges Depo Vol. I*, pp. 67-69. At this time, Hodges had not yet secured financing for the project, but was working on a loan through First Horizon Construction Lending. *Id.*, p. 74. Hodges met a second time with Zimney on April 4, 2005, whereby Hodges discussed the appropriate amount of builder's risk coverage to purchase in order to cover the project. *Id.*, p. 80.

At the April 4th meeting, Mr. Hodges determined that the amount of coverage under a Western Community Builder's Risk policy should be \$5.3 million. *Hodges Depo, Vol. I*, p. 81. Hodges determined that number based on a construction budget he had prepared with his construction manager, Steve Dresser. *Id.* It was Hodges' belief that he was buying a builder's risk policy based on the amount of his construction budget for costs he thought he would incur in the event of a catastrophic loss during the course of construction, i.e., what it would cost if the building were destroyed. *Id.*, pp. 90-91.

Villa Highlands' prospective lender at the time, First Horizon, had completed an appraisal of the project on March 15, 2005. *See COE*, Exh. 12, *Anderson Aff.*, Exh. G. That appraisal provided that the project's worth at the proposed date of completion was \$7,700,000. *Id.* Mr. Hodges has testified that, while he was not provided with a copy of the appraisal immediately after it was completed, he received a copy approximately six months after it was completed. *See COE*, Exh. 12, *Anderson Affidavit*, Exh. A *Hodges Depo*, Vol I, p. 79. However, he never gave his agent, Dale

Zimney, a copy of the appraisal. *Id.* On June 1, 2005, First Horizon notified Villa Highlands' agent, Dale Zimney, that the applicable amount of coverage for Villa Highlands' builder's risk policy should be increased to \$5,645,000. *Anderson Aff.*, Exh. I. This is the amount reflected in Villa Highlands' application for builder's risk insurance. *Id.*, Exh. C (bates no. DZ 55).

Pursuant to this application, Western Community issued Villa Highlands a Builder's Risk policy in the amount of \$5,645,000. See *COE*, Exh. 12, *Anderson Affidavit*, Exh. D. Villa Highlands' Policy provides notice that various provisions in the policy restrict coverage and that the owner should read the entire policy "to determine rights, duties and what is and is not covered." *Anderson Aff.*, Exh. E., p. 1. Mr. Hodges has testified that he did review the Policy in its entirety. *Hodges Depo, Vol I*, pp. 100-101; *Anderson Aff.*, Exh. B, *Hodges Depo Vol II*, pp. 191, 192.

Villa Highlands' Policy provides that it provides coverage "for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss. See *COE*, Exh. 12, *Anderson Aff.*, Exh. E, *Policy*, A.1., p. 1. The Policy also notes that, in the event of a covered loss, Western Community would either: (1) pay the value of lost or damaged property or (2) pay the cost of repairing or replacing the lost or damaged property. *Id.*, *Policy*, E.4.(a), 1 & 2, p. 5. Further, the Policy states that Western Community would determine the cost of repairing or replacing damaged property "in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supercedes the Valuation Condition. *Id.*, *Policy* E.4., p. 5.

The Policy's Valuation Condition states that Western Community would "determine the value of Covered Property at actual cash value as of the time of loss or damage." *Policy*, E.6., p. 6.

The Policy also contained several restrictions and limiting conditions, including the requirement that the Project be adequately insured. See *Policy*, F.2., p. 6. The co-insurance condition in the Policy (titled the "Need for Adequate Insurance" clause), notes that Villa Highlands:

Will not pay a greater share of any loss than the proportion that the Limit of Insurance bears to the value on the date of completion of the building described in the Declarations.

Policy, F.2., p. 6. In the event of a loss, the Policy also contains provisions governing any dispute between the insurer and insured with respect to the applicable amount to be assigned to the value of the property or value of the loss. The Policy provides:

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge or court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

Policy, E.2., p. 4 (Emphasis added).

Mr. Hodges did not have any contact with his insurance agent, Dale Zimney, until April 2006 when various insurance policies with regard to the Project came up for renewal. See *COE*, Exh. 12, *Anderson Affidavit*, Exh. A, *Hodges Depo*, Vol I, p. 92. During the April 2006 meeting, the discussion included the amount of insurance under Villa Highlands' Builder's Risk Policy. *Id.*, pp. 93, 101-102. Mr. Hodges was asked if he felt the Project was adequately covered and Hodges replied that he did not believe anything needed to be changed under the Policy. *Id.* Once again, although Mr. Hodges knew that the Project, minus the value of the land, would be worth at least

\$7,160,000 upon completion (*See COE*, Exh. 12, *Anderson Aff.*, Exh. G), he did not increase the amount of coverage under his Builder's Risk Policy. *Hodges Depo, Vol I*, p. 93. In fact, an updated appraisal of the Project was completed by Villa Highlands' lender on August 25, 2006, which determined that the value of the Project, minus the value of the land, was \$7,950,000. *See COE*, Exh. 12, *Anderson Aff.*, Exh. H.

On May 21, 2006, while the Villa Highlands Building was still under construction, it caught fire and suffered extensive damage. *See R.*, p. 173, *Second Amended Complaint*, ¶ 8. Villa Highlands estimated that, at the time of the loss, the Project was between 50-60% completed from a cost standpoint, while 75% completed from a timeline standpoint. *See COE*, Exh. 12, *Anderson Aff.*, Exh. B, *Hodges Depo, Vol II*, pp. 261-262. On July 24, 2006, Villa Highlands formally submitted its insurance claim for the cost to reconstruct the Project. *COE*, Exh. 12, *Anderson Aff.*, Exh. F.

In investigating and adjusting Villa Highlands' claimed loss, Western Community created a spreadsheet which represents the calculations utilized by Western Community in determining the amount Villa Highlands was entitled to be paid for the loss under its Builder's Risk Policy. *See COE*, Exh. 11, *Petersen Aff.*, Exh. A. While Western Community disagreed with Villa Highlands with regard to the estimated value of the Building on the date of completion (its own evaluation of the value of the building was higher), it still utilized the lower figure presented by Villa Highlands in the amount of \$7,160,000 (the amount reflected in First Horizon's March 15, 2005 appraisal). The result of this action was that it effectively reduced the amount that Villa Highlands had underinsured its building. The spreadsheet notes that the limit of insurance under the Policy was \$5,645,000. *Id.*

Western Community valued the amount of Villa Highlands' loss as a result of the fire at \$3,967,157.

Id.

Below the line showing Western Community's calculation of the amount of the loss, the Policy's "need for adequate insurance" calculation was performed pursuant to § F.2. of the Policy.

Id. That calculation revealed that Villa Highlands was below the 100% co-insurance amount set forth in the declarations.¹ Therefore, Western Community reduced the amount of recoverable loss to \$3,127,207. This was the amount Western Community paid to Villa Highlands under the Policy, after deducting the applicable deductible. See *COE*, Exh. 12, *Anderson Aff.*, Exh. J. p. 5.

Villa Highlands disputed the figures utilized by Western Community in determining both the value of the loss and the value of the building on the date of completion for purposes of calculating the amount of Villa Highlands' underinsurance under the Policy. On October 11, 2006, Western Community sent a letter to Villa Highlands advising it that, due to Villa Highlands' dispute as to the value of the building, Western Community was invoking the appraisal clause of the Policy in an attempt to resolve the dispute. See *COE*, Exh. 2, *Affidavit of Robert A. Anderson in Support of Motion to Compel Appraisal* ("Anderson Aff. II"), Exh. B.

On October 20, 2006, Western Community advised Villa Highlands that it had retained Joe Corlett of Mountain States Appraisal to conduct an appraisal on its behalf. *COE*, Exh. 2, *Anderson Aff. II*, Exh. C. On October 30, 2006, counsel for Villa Highlands responded to the notice invoking the appraisal clause. *Id.*, Exh. D. While Villa Highlands did not agree that the issues were the

¹ In order to calculate the amount of under-insurance, Western Community took the Limit of Insurance, \$5,645,000 and divided it by the value of the building on the date of completion, \$7,160,000, which revealed that the proportion of the Limit of Insurance to the Value on Date of Completion was .7884. The amount of the loss, \$3,967,157, was then multiplied by .7884 to determine the amount Western Community would pay under the Policy, i.e., \$3,127,207.

proper subject of an appraisal determination, it stated that it had chosen James Brown of James Brown & Associates to conduct an appraisal on its behalf. On November 8, 2006 Western Community wrote to counsel for Villa Highlands expressing the need for both appraisers to get in contact with each other as soon as possible to expedite the process and reach an agreeable conclusion. *Id.*, Exh. E.

When no response was received, Western Community once again contacted counsel for Villa Highlands on December 4, 2006, noting that Western Community had completed its appraisal through Mr. Corlett and informing Villa Highlands that its appraiser had yet to get in contact with Corlett. *COE*, Exh. 2, *Anderson Aff. II*, Exh. F.

Although it was Western Community's belief that the appraisal process set forth under the Policy was underway, on December 6, 2006, Villa Highlands initiated active litigation by filing its Amended Complaint against Western Community. *R.*, p. 74.² In the Amended Complaint, Villa Highlands asserted, in Count One, a claim for breach of contract against Western Community. Under that claim, Villa Highlands asserted that it had a contractual relationship with Western Community pursuant to a builder's risk insurance policy and, after a fire in which the Villa Highlands building suffered catastrophic damages, it submitted a claim to Western Community under its policy. *R.*, p. 77-78. Villa Highlands asserted that Western Community refused to negotiate the loss claim in good faith and refused to pay the full amount of the claim. *R.*, p. 78-79. Further, Villa Highlands claimed that Western Community's actions deprived it of the full benefits of the Policy. *R.*, p. 81.

² Although Villa Highlands filed an original Complaint on November 13, 2006, that pleading was never served upon Western Community.

Villa Highlands also submitted a claim for declaratory relief under the Amended Complaint, asserting that the Court should declare the relative rights and obligations of the parties under the Policy and determine that Villa Highlands was entitled to the payment of the full amount due and owing pursuant to the Policy without any reduction or offset. *R.*, p. 83. Further, Villa Highlands alleged, under Counts Three and Four, that Western Community was liable for bad faith and breach of fiduciary duty with regard to the manner in which it adjusted and paid its claim, negligence (Count Five) for failing to properly investigate and pay Villa Highlands' claim in accordance with the terms of the Policy and misrepresentation (Count Six) with regard to instructions Western Community allegedly provided in connection with Villa Highlands' procurement of the Policy. *R.*, pp. 84-93.

Over a month later, on January 10, 2007, Western Community sent another letter to counsel for Villa Highlands, summarizing a conversation in which counsel for Villa Highlands apparently represented that their client had not retained an appraiser. See *COE*, Exh. 2, *Anderson Aff. II*, Exh. G. Western Community noted in the letter that it was eager to resolve the matter and noted Villa Highlands' duty to cooperate in the investigation and/or settlement of the claim. Villa Highlands never provided a timely response to Western Community's correspondence.

On or about January 23, 2007, Western Community answered Villa Highlands' Amended Complaint and asserted a Counterclaim against it, alleging that Villa Highlands has refused to cooperate with Western Community's efforts to investigate the loss and adjust the claim, as well as refused to participate in the appraisal process set forth under the terms its Policy. *R.*, p. 142.

On January 26, 2007, counsel for Villa Highlands wrote to Western Community, informing it that James Brown had conducted an appraisal on behalf of Villa Highlands and requesting that

Western Community provide a copy of Corlett's appraisal so it could be determined whether the parties actually disagreed as to the value of the property or value of the loss. *See COE*, Exh. 2, *Anderson Aff. II*, Exh. H. On February 1, 2007, Western Community sent correspondence to counsel for Villa Highlands informing Villa Highlands that it was not complying with the appraisal process set out in the Policy and that when Mr. Corlett contacted Villa Highlands' appraiser, James Brown, to discuss the appraisal with him, Mr. Brown indicated that he had not been retained as Villa Highlands' appraiser. *Id.*, Exh. I.

On or about February 20, 2007, counsel for Villa Highlands sent counsel for Western Community a letter inquiring whether Western Community was disputing Villa Highlands' position with regard to the value of the property or the amount of the loss due to the fire. *See COE*, Exh. 2, *Anderson Aff. II*, Exh. J. Counsel for Villa Highlands also asserted that, according to her records, there was nothing to suggest that Western Community disagreed with Villa Highlands' value of the property or amount of the loss necessitating the use of the appraisal process specified under the Policy. *Id.*

On February 23, 2007, Western Community responded to counsel for Villa Highlands by stating that it should have been clear to Villa Highlands that Western Community disagreed with the value of the property and amount of the loss, especially since Villa Highlands had made extensive use of Mr. Corlett's appraisal during an earlier mediation between the parties. *Id.*, Exh. K. Further, on March 16, 2007, Western Community's counsel responded to Villa Highland's inquiry, noting Western Community's position that Villa Highlands had miscalculated the amount of the loss by requesting payment for portions of the building which were not completed at the time of the fire. *Id.*,

Exh. L. Further, Western Community requested that Villa Highlands agree to the dispute resolution procedure outlined in its Builder's Risk policy. *Id.*

On March 27, 2007, counsel for Villa Highlands sent a letter to Western Community stating that Villa Highlands was agreeable with cooperating with the appraisal and/or dispute resolution process set forth in the insurance policy at issue. *COE*, Exh. 2, *Anderson Aff. II*, Exh. M. On March 29, 2007, Western Community sent a letter to Villa Highlands' counsel confirming its choice of an appraiser and noting its understanding with respect to the individual who would be representing Villa Highlands in the appraisal process. *Anderson Aff. II*, Exh. N. The letter also noted that the two appraisers should mutually agree on an umpire pursuant to the terms of the Policy. *Id.* On November 5, 2007, Western Community sent a letter to counsel for Villa Highlands once again communicating frustration with Villa Highlands' lack of response and failure to move forward with the appraisal process. *Anderson Aff. II*, Exh. O. Thus, on December 14, 2007, Western Community filed a Motion to Compel Appraisal, seeking an Order compelling Villa Highlands to comply with the terms of the Policy and engage in the appraisal process set forth therein, whereby Villa Highlands' loss could be fully and finally determined. *COE*, Exh. 1.

In an effort to resolve the issues related to the dispute regarding the value of the loss and value of the building, both parties began discussing a Stipulation that was ultimately signed on January 17, 2008, whereby the parties stipulated that the value of the building, for purposes of calculation of the underinsurance provision (§ F.2 of the Policy), would be \$7,580,000, while the amount of Villa Highlands' loss would be \$3,967,157.00. *See Appendix, Exh. A.*

The effect of this Stipulation was that there was no longer any dispute between the parties as

to whether Western Community had paid the claim according to the dictates of the Policy or whether it had miscalculated the value of the building or value of Villa Highlands' loss. Indeed, the fact that Western Community's loss payment obligations were no longer a part of the suit was reflected in the Second Amended Complaint filed by Villa Highlands on January 8, 2008. *R.*, p. 170. Under the Second Amended Complaint, Villa Highlands voluntarily dismissed its claims for direct breach of contract, bad faith, breach of fiduciary duty and misrepresentation.

Moreover, in its Second Amended Complaint, Villa Highlands narrowed and re-focused the nature of the claims in this case. Villa Highlands asserted that its insurance agent, Dale Zimney, was negligent and breached his contract with Villa Highlands by failing to ensure that it adequately insured the Project and failing to procure full and complete coverage for the building. *R.*, pp. 171-175. In other words, Villa Highlands asserted that the building was inadequately insured and it was unable to secure full payment for its loss under the Policy due to bad advice given by its insurance agent, Dale Zimney. Villa Highlands also alleged, in Count 4, that Mr. Zimney's tort and contractual liability was imputed to Western Community under agency theory.

Under that count of the Second Amended Complaint, Villa Highlands maintained that Mr. Zimney had a contract with Western Community authorizing him to sell its insurance policies and products to consumers. *R.*, p. 176, ¶ 23. Further, Villa Highlands claimed that Western Community's conduct and actions gave rise to Mr. Zimney having apparent authority to bind Western Community for representations made by Zimney to Villa Highlands. *R.*, p. 177, ¶ 25. Finally, Villa Highlands charged that, based upon Zimney's apparent authority, Western Community was bound by his representations concerning the subject policy. *R.*, p. 177, ¶ 27. A similar vicarious

liability was also stated in tort under Count 5 of the Second Amended Complaint.

Villa Highlands also modified the Declaratory Judgment claim under the Second Amended Complaint. Villa Highlands noted that Western Community applied the “Need For Adequate Insurance” provision of the Policy to reduce the amount of the loss against the policy limits paid under the Policy. *R.*, p. 179, ¶ 33. However, due to the imputed liability against Western Community due to Mr. Zimney’s alleged negligence and breach of contract, Villa Highlands asked the court to find that it was entitled to the full amount of its insurance claim, without reduction due to being found underinsured under the Policy. *R.*, p. 179, ¶ 34-35.

On March 3, 2008, Western Community filed its Motion for Summary Judgment. *R.*, p. 209. The Motion sought dismissal of Villa Highlands’ claims on five separate bases: (1) that Farm Bureau was not a proper defendant in the case; (2) that Count 4 of the Second Amended Complaint, asserting a claim for vicarious liability against Western Community due to Mr. Zimney’s breach of contract, was untenable under Idaho law; (3) that Count 5 of the Second Amended Complaint, asserting a claim for vicarious liability against Western Community due to Mr. Zimney’s alleged tortious acts, was not supported under Idaho law due to Mr. Zimney’s independent contractor status with Western Community, (4) Villa Highlands’ declaratory judgment action was moot due to the Stipulation reached between the parties, and (5) the facts in the record failed to establish a viable claim for promissory estoppel against Western Community. *COE*, Exh. 10.

Prior to the hearing on Western Community’s Motion, on March 6, 2008, counsel for Villa Highlands filed a Motion for Leave to Withdraw as counsel of record and a Motion to Vacate Trial. The motion was heard on March 12, 2008. It was Western Community’s understanding that the

Motion was initiated because Bill Hodges from Villa Highlands wanted to terminate the Davison Copple firm and procure new counsel as a result of disagreements with the litigation strategy Davison Copple was employing in litigating the case. During the hearing, the district court recognized the inherent problems associated with the withdrawal of counsel less than two months prior to the case being set to commence for trial, but noted that resetting the trial for approximately one year down the road was prejudicial to the defendants in the case. *Tr.*, March 12, 2008, pp. 4-5. Further, noting that the time period for Villa Highlands to respond to Western Community's Motion for Summary judgment would occur during the 20 day period allotted for Villa Highlands to procure new counsel, the Court extended the date for the summary judgment hearing until April 9, 2008. *Id.*, pp. 6-7. However, the district court ruled that no continuance of the trial would be granted. *Id.*, p. 10.

Perkins Coie entered a Notice of Appearance on behalf of Villa Highlands on March 21, 2008. *R.*, p. 228.³ Almost immediately upon being involved in the case, new counsel for Villa Highlands began asserting its desire to void the portion of the prior Stipulation between the parties with regard to the value of the building. Thus, on April 3, 2008, Western Community filed its Motion to Reset Hearing on the Motion to Compel Appraisal. *R.*, p. 241. The hearing on Western Community's Motion for Summary Judgment was conducted on April 9, 2008.

During that hearing, counsel for Villa Highlands asserted that his client had a continuing disagreement with the manner in which Western Community valued the building for the purpose of adjusting the loss and the Stipulation did not resolve the dispute between the parties with regard to

³ It should be noted that Cynthia Yee-Wallace, who is representing Villa Highlands as a member of the firm Perkins Coie, was previously involved in the representation of Villa Highlands when it was represented by the firm Davidson

the value of the building on the date of completion for purposes of calculating the underinsurance penalty under the Policy. Counsel for Western Community noted that the purpose of the Stipulation was to resolve both parts of the equation that went into determining the proper payment of the claim in connection with the underinsurance provision of the Policy – the value of the building and the value of the loss. *Tr.*, April 9, 2008, pp. 75-76.

The district court ultimately determined during the summary judgment hearing that, under Villa Highlands’ declaratory judgment cause of action, the insurance policy was unambiguous and that the term “value” for purposes of calculating the value of the building for purposes of loss payment was “actual cash value.” *Tr.*, April 9, 2008, pp. 80-81. The court further relieved Villa Highlands from paragraph 1 of the Stipulation and granted Western Community’s Motion to Compel Appraisal, noting that the appraisal process, including the submission of the two appraisals to a mutually agreeable umpire for final decision, was to be completed prior to trial. *Id.*, p. 88. However, the portion of the Stipulation regarding the value of Villa Highlands’ loss, \$3,967,157.00, remained in effect. *Id.*, p. 96. Thus, the parties agreed that they would submit their appraisals of the value of the building on the date of completion to each other, mutually choose an umpire and allow the umpire to determine which appraisal to utilize for purposes of the claim. It should be noted that the reason this value was important in this case was the fact that this valuation was determinative of whether Villa Highlands was adequately insured under the Policy and whether Western Community had properly reduced the loss claim due to the application of the “need for adequate insurance” provision under the Policy.

During the summary judgment hearing, the Court also granted the Motion to dismiss Farm Bureau as a defendant in the suit. *Tr.*, April 9, 2008, pp. 116-117. On the vicarious liability claims (Counts 4 & 5 of the Second Amended Complaint), the court began to deny the summary judgment motion, although later noting that further research and discussion of the issues would be conducted prior to an ultimate decision and trial. *Id.*, p. 122-123.

The parties submitted additional briefing on the vicarious liability claims on April 11, 2008. Further, On April 15, 2008, Villa Highlands filed a Motion to Compel depositions of certain Western Community personnel which had recently been scheduled. *R.*, p. 248. Western Community responded to the Motion to Compel by filing a Motion for Protective Order on April 15, 2008. *R.*, p. 251. The basis for Western Community's motion was that the claims against it in Counts 4 & 5 of the Second Amended Complaint were vicarious in nature and, since there were no direct claims against it, discovery regarding the actions of Western Community personnel related to the investigation and adjustment of the loss was beyond the pleadings in the case.

A hearing was held on April 16, 2008 to resolve the competing motions regarding the depositions of Western Community personnel. During the hearing, counsel for Villa Highlands represented his client's position that Count 4 actually asserted a direct breach of contract claim against Western Community, making the requested discovery relevant. *Tr.*, April 16, 2008, pp. 17-19. In fact, counsel for Villa Highlands went one step further and represented in open court that his client was not asserting Count 4 on the basis that Western Community was vicariously liable for Mr. Zimney's breach of contract to Villa Highlands. *Id.*, pp. 21-23. The Court reviewed the record and determined that Count 4 of the Second Amended Complaint did not state a direct breach of contract

claim against Western Community. *Id.*, p. 102, *Tr.*, April 17, 2008, pp. 136, 207-208. Accordingly, the only count against Western Community at trial was whether it was vicariously liable for Zimney's negligence.

In the two weeks prior to trial, the parties completed the appraisal process set forth under the insurance contract. The umpire chosen by the parties agreed with Western Community's appraisal and, therefore, determined that the \$3,127,207 previously paid by Western Community for the loss was appropriate. **Affidavit of Cynthia Yee-Wallace in Support of Motion for Relief from Judgment**, Exh. Y (submitted under Appellant's Second Motion to Augment Record).

On the morning of the first day of trial, the Court took up the issue of the admissibility of several items of evidence pursuant to Western Community's Motion in Limine. *Tr.*, May 5, 2009. During the hearing, counsel for Villa Highlands once again noted the parties' stipulation that the amount of Villa Highlands' loss was \$3,967,000 and that the amount paid by Western Community for the loss was \$3,127,207, leaving a difference of approximately \$850,000 which Villa Highlands asserted represented its damages it would be stating at trial. *Tr.*, May 5, 2008, pp. 10-11.

During the hearing before trial commenced, counsel for Villa Highlands noted, on several occasions, that they were not going to challenge the appraisal process. *Tr.*, May 5, 2008, pp. 7, 12-13, 18-19, 21-23. Counsel specifically represented:

I just wanted to say that with respect to the appraisal process, we aren't waiving our right to challenge that on appeal. We reserve our right to challenge on appeal, but for purposes solely for this trial, we are not challenging that.

Tr., May 5, 2008, p. 7 (emphasis added). Indeed, counsel noted that Villa Highlands had "accepted

the appraisal process.” *Id.*, p. 18.⁴ Hence, this constituted the end of the appraisal process under the Policy and there was nothing more for the Court to decide under the declaratory action. *See, e.g., R.*, p. 282, ¶ 4. Trial on the matter proceeded and, on May 13, 2008, the jury determined that Villa Highlands’ negligence was greater than that of Mr. Zimney and that there was not an oral contract between Mr. Zimney and Villa Highlands. *R.*, p. 288. Thus, there was no basis for vicarious liability against Western Community. *Id.*

On May 22, 2008, Villa Highlands objected in general fashion to the proposed Judgment submitted by Western Community on the basis that not all of its claims pending against Western Community had been dismissed. *R.*, p. 293. On May 27, 2008, the Court entered its Judgment, dismissing Villa Highlands’ claims against Western Community. *R.*, p. 296. On July 8, 2008, Villa Highlands filed its Motion to Relief from Judgment, asserting that Count Six of the Second Amended Complaint, the claim for declaratory relief, had not been resolved or concluded. Also on July 8, 2008, Villa Highlands filed its Notice of Appeal. *R.*, p. 301. On August 26, 2008, the Court denied Villa Highlands’ Motion on the basis that no issues related to the declaratory action were tried in the matter and that the completion of the appraisal process and Villa Highlands’ non-objection to that process rendered the claim for declaratory relief moot and/or of no further consequence to the action. *See, Appendix B*, “Decision and Order on Plaintiff’s Motion for Relief from Judgment.”

⁴ It should be noted that in its Appellate Brief, Villa Highlands represents that told the district court that it was not challenging the appraisal process for purposes of the “jury trial.” Thus, the implication is that somehow Villa Highlands had reserved the right to challenge the appraisal in front of the district court after the jury trial was completed. However, a review of the hearing transcript clearly evidences that no such distinction was made and Villa

II. ISSUES ON APPEAL

Western Community does not take issue with the manner in which Villa Highlands has framed the issues for appeal.

III. COSTS AND ATTORNEY'S FEES ON APPEAL

Pursuant to I.A.R. 40 and 41, along with Idaho Code §§ 12-120(3) and 12-121, Western Community respectfully requests an award of its costs and attorney's fees on appeal. Western Community would also note that its request for costs and fees has been asserted, in large measure, on the basis that Villa Highlands' appeal is frivolous and without merit, especially since Villa Highlands' complaints on appeal involve issues related to failures in its own litigation strategy and/or failure to follow the District Court's rulings, rather than appealable error.

IV. ARGUMENT

A. The District Court Correctly Concluded that Count Four of Plaintiff's Second Amended Complaint did not State a Direct Breach of Contract Claim against Western Community

Western Community asserts that Villa Highlands has not identified the correct standard of review with regard to this issue. Villa Highlands has asserted a standard of review under a 12(b)(6) Motion to Dismiss a complaint. However, no such motion was ever filed with respect to Count 4 of the Second Amended Complaint. As noted in the procedural history above, the issue of the viability of Count 4 was asserted in Western Community's Motion for Summary Judgment.

As noted above, in the Amended Complaint, Villa Highlands asserted a claim for breach of contract against Western Community. Under that claim, Villa Highlands asserted that it had a

Highlands noted that they would not be contesting the appraisal process during the entirety of the trial of this matter.

contractual relationship with Western Community pursuant to a builder's risk insurance policy and, after a fire in which the Villa Highlands building suffered catastrophic damages, it submitted a claim to Western Community under its policy. *R.*, p. 77-78. Villa Highlands asserted that Western Community refused to negotiate the claim in good faith and refused to pay the full amount of the claim. *R.*, p. 78-79. Further, Villa Highlands claimed that Western Community's actions deprived it of the full benefits of the Policy. *R.*, p. 81.

However, the parties entered into a Stipulation on January 17, 2008 (Appendix A), whereby the parties stipulated to both the value of the building on the date of completion and the value of the loss. The clear effect of the Stipulation was that there was no longer any dispute between the parties as to whether Western Community had paid the claim under the dictates of the Policy. Further, the nature of the Stipulation confirmed that the \$3,127,207 paid by Western Community for the loss fully satisfied its burden under the Policy. Villa Highlands had clearly changed its focus in the litigation to whether its underinsurance of the building was caused by faulty advice provided by Mr. Zimney as to how much insurance Villa Highlands should have requested when it purchased the Policy.

The fact that Western Community's loss payment obligations were no longer a part of the suit was reflected in the Second Amended Complaint filed by Villa Highlands on January 8, 2008. *R.*, p. 170. Under the Second Amended Complaint, Villa Highlands voluntarily dismissed their claims for bad faith, breach of fiduciary duty, misrepresentation and breach of a contract directly with Western Community and thus narrowed the nature of the claims in this case. Villa Highlands asserted that its insurance agent, Dale Zimney, was negligent and breached his contract with Villa Highlands by

failing to ensure that it adequately insured the Project and failing to procure full and complete coverage for the building. *R.*, pp. 171-175. In other words, Villa Highlands asserted that the building was inadequately insured and it was unable to secure full payment for its loss under the Policy due to bad advice given by its insurance agent, Dale Zimney. Villa Highlands also asserted in the Second Amended Complaint that Mr. Zimney's tort and contractual liability was imputed to Western Community under agency theory.

Under Count Four of the Second Amended Complaint, Villa Highlands asserted that Mr. Zimney had a contract with Western Community authorizing him to sell its insurance policies and products to consumers. *R.*, p. 176, ¶ 23. Further, Villa Highlands claimed that Western Community's conduct and actions gave rise to Mr. Zimney having apparent authority to bind Western Community for representations made by Zimney to Villa Highlands. *R.*, p. 177, ¶ 25. Finally, Villa Highlands charged that, based upon Zimney's apparent authority, Western Community was bound by his representations concerning the subject policy. *R.*, p. 177, ¶ 27. While this particular allegation mentions the term "breach of contract," its use in ¶ 27 clearly refers to the alleged contract formed by Zimney's representations under Count One of the Second Amended Complaint and not the insurance policy itself. As further evidence of the intent of Count Four, a similar vicarious liability claim was also stated in tort under Count Five of the Second Amended Complaint. This claim ultimately was the only claim asserted at trial against Western Community by Villa Highlands.

While Villa Highlands utilizes a few words or select phrases of Count Four to support an argument that it sets forth a direct breach of contract claim against Western Community, the claim,

when read in entirety, clearly outlines a vicarious liability claim in contract, similar in manner to the vicarious liability in tort claim asserted under Count Five.

Western Community filed its Motion for Summary Judgment on March 3, 2008 with regard to Count 4 of the Second Amended Complaint on the basis that there were no facts evidencing a contract between Villa Highlands and Dale Zimney upon which to assert vicarious liability against Western Community and that there were no facts in the record upon which to assert the application of agency theory in this case. *COE* Exh. 10. Thus, it was certainly Western Community's understanding that Count 4 reflected a vicarious liability claim. Villa Highlands' summary judgment motion, filed February 29, 2008, also evidenced its intent with regard to the scope of the litigation. *COE* Exh. 5. In that Motion, Villa Highlands attempted to utilize the declaratory relief cause of action to procure a ruling, not that Western Community breached the insurance contract, but that the Policy was ambiguous and contained unconscionable provisions and, therefore, the underinsurance provision should not be applied to reduce its loss recovery in this matter. *Id.*

However, when the firm Davison Copple withdrew from the representation of Villa Highlands and Perkins Coie undertook to continue to prosecute the claim on Villa Highlands' behalf, the litigation strategy dramatically shifted. Villa Highlands immediately attempted to unwind the prior Stipulation of the parties related to the value of the building on the date of completion. Given that concern, Villa Highlands had the opportunity to simply let the appraisal process run its course, which process was designed to allow each side to present their respective cases to a neutral third party. Instead, Villa Highlands sought to unwind the Second Amended Complaint and litigate the case based on the original breach of contract claim asserted in the earlier Amended Complaint.

Western Community learned of this shift in Villa Highlands' litigation position during the summary judgment hearing conducted on April 9, 2008.

Of course, by the time Perkins Coie entered the case, the time for amending pleadings had long passed and counsel was under the duty to prosecute the action in accordance with the pleadings in front of the Court. However, this did not stop counsel for Villa Highlands from attempting, a mere month before trial, to once again greatly expand the scope of the litigation. New counsel for Villa Highlands was obviously not pleased with the litigation strategy of prior counsel and may have determined that a better strategy would have been to pursue the breach of contract claim rather than attacking the specific language of the Policy under the auspices of a declaratory judgment action. Thus, counsel attempted to read a direct breach of contract action into Count Four where such a claim was clearly not contemplated by the language of the Second Amended Complaint.

The District Court's determination that Count Four did not state a direct breach of contract claim against Western Community was not limited to a review of the language of Count Four, as Villa Highlands would suggest. Rather, the decision was made in the context of the litigation history in the case. That history clearly revealed that Villa Highlands had affirmatively chosen to abandon its direct breach of contract claim in the Amended Complaint in favor of a vicarious liability claim. Therefore, the Court was able to not only determine the language of the Second Amended Complaint but also Villa Highlands' intent in drafting Count 4 in the Second Amended Complaint.

The Court's decision in this regard was not only intended to fairly hold Villa Highlands to its own amended pleadings, but also to prevent the expansion of legal issues and factual discovery when the parties were set to try the case in less than one month. A review of the relevant litigation history

reveals that, from the time Villa Highlands executed the Stipulation at issue until the time of Perkins Coie's involvement in the case, Villa Highlands never undertook any efforts to procure discovery regarding a direct breach of contract claim against Western Community or otherwise prepare such a claim for trial. However, once Perkins Coie undertook its representation of Villa Highlands, its entire litigation strategy shifted and Villa Highlands, for the first time, endeavored to take depositions of Western Community's agents and employees to establish a factual basis for a breach of contract claim and also to assert the entitlement to consequential damages under a breach of contract claim. See *COE* 33 ("Memorandum in Support of Plaintiff's Motion to Compel"); *COE* 35 ("Memorandum in Support of Western Community's Motion for Protective Order"); *Tr.*, April 17, 2008; *Tr.*, April 28, 2008.

Therefore, Western Community also asserts that the District Court's decision that Count Four did not allege a direct breach of contract claim against it was a decision based on the sound discretion of the Court not to allow Villa Highlands to revive claims that it had previously voluntarily abandoned, especially since the parties were on the eve of trial and voluminous new discovery would be required to litigate such a claim.

It should also be emphasized that as the procedural history of this case clearly demonstrates, the parties were continuing to work through the appraisal process specified under the Policy during the pendency of the litigation. The appraisal process was intended to determine whether the values utilized by Western Community in paying the loss (i.e., the value of the building on the date of completion) were appropriate. If Villa Highlands' appraiser disagreed with the values utilized by Western Community's appraiser, the Policy clearly required that the parties choose an umpire, who

would make the final determination of which appraisal was appropriate. *Policy*, E.2., p. 4. The appraisal process was finally completed (once Villa Highlands was ordered by the Court to fully participate in the appraisal) just before trial. Thus, Western Community asserts that there was never a viable breach of contract claim against it either at the time of the filing of the First or Second Amended Complaint since its duties with regard to loss payment could not be judicially determined until the parties had completed the appraisal process.

Ultimately, the fact that Villa Highlands was not able to proceed at trial based on a direct breach of contract claim under Count 4 was an outcome of its own making, not the error of the Court. The Court merely refused Villa Highlands' eve of trial request to completely change the nature and direction of the litigation and revive claims previously abandoned.

B. The Court Appropriately Dismissed Count Six of the Second Amended Complaint since it was Rendered Moot at the Time of Trial and Villa Highlands Failed to Prosecute the Claim Prior to the Close of Trial

Villa Highlands contends that the District Court erred in dismissing Count Six of the Second Amended Complaint, (which was its declaratory judgment claim). Under that claim, Villa Highlands asserted that Western Community applied the "Need for Adequate Insurance" provision under the Policy to reduce the amount of the loss against the policy limits and requested that the Court interpret the Policy and application of the provision in this case. *R.*, p. 179. Once again, that provision provided, in pertinent part:

We will not pay a greater share of any loss than the proportion that the Limit of Insurance bears to the value on the date of completion of the building described in the Declarations.

Policy, F.2., p. 6. After the trial was completed, Villa Highlands requested that the Court declare the relative rights and obligations of the parties under the Policy and determine that it was entitled to the payment of the full amount of its claim pursuant to the Policy without reduction or offset. *R.*, p. 179. Finally, Villa Highlands sought a ruling that any purported underinsurance was caused by Zimney's apparent authority with Western Community. *Id.*

Western Community filed a Motion for Summary Judgment with regard to Count Six on the basis that the insurance policy was unambiguous, should be applied according to its terms and that the Stipulation between the parties (Appendix A), which ended the dispute regarding the value of the building on completion and the value of the loss, rendered the declaratory judgment action moot. *COE* 10.

After oral argument,, the Court declared that the term "value" in paragraph F2 of the Policy unambiguously meant "actual cash value," which was to be determined by replacement costs, given that the building was new. *Tr.*, April 9, 2009, p. 66. The Court did not make a determination as to the proper date to utilize for valuing the building because the parties agreed on using the date of completion. *Id.*, pp. 81-85. Further, the Court did not rule as to which costs should be included or excluded in the appraisal to determine the value of the building because counsel for Villa Highlands stated the issue was something the parties could work out during the appraisal process. *Id.*, pp. 71-72.

Also, during the April 9th summary judgment hearing, the Court ordered Villa Highlands to cooperate in the appraisal process under the Policy and noted that, under the appraisal process set forth by the Policy, both Villa Highlands and Western Community were to procure independent

appraisals and, in the event the two appraisals did not match, to then submit both appraisals to an independent umpire, who would make a decision as to which appraisal should be utilized to determine the value. *Id.*, pp. 73-76. Importantly, the Court interpreted the insurance Policy in a manner such that, the umpire's decision, once issued, would be final, and nothing would be left for the court or jury to decide. *Id.*, p. 75.

Additional hearings were held before the Court on other issues in the case on April 16 and 17, 2008. During both hearings, the Court referenced its summary judgment rulings with respect to Count Six on several occasions and noted that the contract interpretation portions of the claim had been fully determined. *See, e.g., Tr.*, April 16, 2008, pp. 56-58; *Tr.*, April 17, 2008, p. 2. Villa Highlands did not submit any other motion or make any request that the Court make any further ruling as to Villa Highlands' rights and obligations under the terms of the contract during either hearing.

An important part of the litigation history not set forth by Villa Highlands on appeal is the fact that the Court further addressed the declaratory judgment action during an April 28, 2008 hearing. In that hearing, the Court expressed its understanding that the declaratory judgment action would be concluded once the parties either: (1) obtained two matching appraisals, or (2) had an umpire determine the "value" of the building on the date of completion for the purpose of determining the amount Western Community owed under the Policy. *Tr.*, April 28, 2008, p. 13. Villa Highlands never raised any objection or argument with the court's understanding of the appraisal process or the binding nature of the umpire's decision.

On April 29, 2008, the Court entered an order partially dismissing Count Six, finding that the insurance contract was unambiguous. *R.*, p. 282. However, with regard to the portion of the declaratory action requesting that Western Community pay the entirety of Villa Highlands' claimed loss without any reduction, the Court noted that this determination would be based on the completion of the appraisal process, then underway. *R.*, p. 282.

On May 1, 2008, Villa Highlands and Western Community submitted their respective appraisals to an umpire. *Affidavit of Cynthia Yee-Wallace in Support of Motion for Relief from Judgment* (included with materials under Appellant's Second Motion to Augment Record). Villa Highlands submitted an appraisal completed by Integra in September 2006. *Id.*, Exh. T. Western Community submitted an appraisal completed by Mountain States on April 30, 2008. *Id.*, Exh. N & U. On May 2, 2008, the umpire asked the parties for a definition of the term "cash value." *Id.*, Exh. V. The parties sent the umpire a letter stating that the term was defined as "actual cash value," that it did not include certain types of costs and that the umpire should refer to pages 68-69 of the April 9, 2008 hearing transcript for the court's ruling as to the term "value." *Id.*, Exh. W.

On May 4, 2008, one day before the trial began, the umpire sent a letter to the parties with his finding that the Mountain States appraisal submitted by Western Community was more reliable. *Id.*, Exh. Y. That appraisal established that the value of the building on the date of completion was \$8.3 million and, therefore, confirmed that Villa Highlands was underinsured under the Policy. *Id.*, Exh. U. Therefore, the result of the umpire's decision was a finding that Western Community had properly calculated and paid the loss in accordance with its obligations under the Policy.

Once again, during a hearing on the morning of trial, counsel for Villa Highlands stated that Villa Highlands did not plan on attacking the appraisal process at trial. Villa Highlands also stipulated to the amount of damages it would be seeking at trial, the approximate \$840,000 difference between the value of the loss and the amount Western Community paid under the Policy due to the application of the “need for adequate insurance” provision. *See Order on Western Community’s First Motion in Limine*, ¶ 5 (attached with materials pursuant to Appellant’s Second Motion to Augment the Record); *Tr.*, May 5, 2008, pp. 9-11.

The fact that counsel for Villa Highlands agreed before trial that the damages it would be seeking at trial were limited to the \$840,000 difference described above, evidences that Villa Highlands agreed with the outcome of the appraisal. Otherwise, the logical step for Villa Highlands to have taken was to contest the appraisal process prior to the jury hearing the case. After all, the entire point of the appraisal process was to establish the amount of damages Villa Highlands could seek from the jury. (See discussion, pp. 24-25 *supra*).

The case was tried before a jury from May 5, 2008 through May 13, 2008. No issues under Count Six were submitted to the jury. The jury awarded no damages to Villa Highlands. Prior to the close of trial, Villa Highlands never asserted, in motion form or otherwise, that the Court needed to declare anything further with regard to the rights and obligations of the parties under the insurance contract pursuant to Count Six of the Second Amended Complaint. After the trial was concluded, Western Community submitted a proposed Judgment dismissing all claims against it. *R.*, p. 296. Villa Highlands objected to the proposed Judgment on May 22, 2008 on the basis that not all claims had been adjudicated. *R.*, p. 293. However, Villa Highlands did not specifically reference the claim

for declaratory relief in its motion. On May 27, 2008, the court signed the proposed Judgment, ordering that all claims against Western Community, including the claim for declaratory relief, be dismissed with prejudice based on the understanding that no controversy remained.

In its Motion for Relief from Judgment, filed July 8, 2008, Villa Highlands argued for the first time that the Mountain States appraisal chosen by the umpire as the more reliable appraisal, included arguably uninsurable items not covered by the Policy, resulting in the appraisal coming in higher than appropriate. In addition, Villa Highlands asserted that the Supplemental Addendum to the appraisal contained numerous errors and mistakes. Villa Highlands requested that the court set aside the umpire's findings because they were not in compliance with the terms of the Policy and because the umpire's Appraisal Review was based on several errors and mistakes.

In its August 26, 2008 Order on Villa Highlands' Motion for Relief from Judgment ("Order, re: Relief from Judgment"), the Court found that a justiciable controversy did not exist with regard to the declaratory judgment action at the conclusion of trial. Further, the Court clarified that the intent of its April 28, 2008 ruling during the hearing regarding the declaratory action was to require the completion of the appraisal process required by the Policy and, once completed, that there would be no further issues to be determined under Count Six. *See Appendix B*, Order, re: Relief from Judgment, p. 7. Further, the Court found:

Despite the fact that the declaratory action was not dismissed until after the trial and a year and a half after filing, Villa Highlands never made the court aware of any remaining controversy that needed to be decided by the court. Although Villa Highlands reserved the right to contest the appraisal process on appeal, at no point between the issuance of Mountain States' revised appraisal on April 30, the umpire's decision on May 4, and the court's order on May 27 did Villa Highlands bring any motion before the court asking the court to

vacate the umpire's decision and to declare what types of costs may be appropriately included in the appraisal under the terms of the insurance policy. Instead of bringing a motion asking the court to grant the relief requested under the declaratory action by declaring the appraisal process or umpire's decision invalid, Villa Highlands stipulated to the damages sought at trial, thereby rendering the appraisal process moot since the end result of the appraisal process would otherwise have been the basis for determining damages. On May 22, Villa Highlands did object to Western Community's proposed judgment on the grounds "that not all claims pending against Western Community have been dismissed with prejudice," but Villa Highlands did not explain what claims or controversies remained for the court to decide.

Id., p. 7. Thus, the District Court concluded that there was no valid basis to reconsider the Judgment previously entered and allow Villa Highlands to continue to litigate issues under the declaratory relief claim.

1. Villa Highlands did not Preserve any Issues with respect to the Appraisal Process for Trial

Villa Highlands spends a great deal of its briefing outlining its criticism of the appraisal process, the umpire's decision and Western Community's alleged representations and/or positions taken during the appraisal process. However, all of this background information ignores the plain fact that Villa Highlands is attempting to assert an issue on appeal that was never raised before the trial court. It is fundamental that an issue not raised during the trial will not be considered by Idaho's appellate courts when raised for the first time on appeal. *See, e.g., State v. Doe*, 123 Idaho 370, 371, 848 P.2d 428, 429 (1993).

Western Community would note that it was forced to procure an order of the District Court just to get Villa Highlands to undertake its duty under the policy to participate in the appraisal process. Villa Highlands' delay and failure to abide by its contractual obligations meant that the

appraisal process was not able to be completed until just before trial. The Western Community appraisal of the value of the building on the date of completion submitted to the umpire came in higher than the value originally utilized by Western Community when it paid the loss. The umpire agreed that Western Community's appraisal of the value of the building on the date of completion was more accurate and/or reliable. While Western Community could have rightfully utilized the umpire's decision to further reduce Villa Highlands' loss payment under the Policy (as the result of the appraisal process confirmed that Villa Highlands was actually even more underinsured than contemplated by Western Community when the claim was originally adjusted), the parties agreed to utilize the building valuation figure originally determined by Western Community, which meant that the damages Villa Highlands would be asserting at trial would be set at approximately \$840,000. *Tr.*, May 5, 2008, pp. 9-11.

When the parties convened on the first day of trial and were arguing and discussing the various issues raised by motions in limine before the Court, Villa Highlands had a clear opportunity to assert a motion contesting the validity of the appraisal process or the umpire's decision. Rather than utilizing that opportunity, Villa Highlands represented in open court that it was not contesting the outcome of the appraisal process at trial and then stipulated to the amount they would be seeking for damages at trial. *Tr.*, May 5, 2008, pp. 7, 9-11, 12-13, 18-19, 21-23.

Villa Highlands' stipulation in this regard was especially important, since the object of the appraisal process was the determination of the value of Villa Highlands' insurance claim and, thus, the amount of damages Villa Highlands would be presenting to the jury. As noted above, the final application of the "need for adequate insurance" provision of the Policy could not be addressed until

the value of the building on the date of completion had been determined. Thus, the issue of Villa Highlands' damages was not even ripe to be heard in front of the jury until the appraisal process was complete and the parties had agreed with respect to the values utilized by Western Community in paying the loss at issue.

Ultimately, at no time before the close of the trial did Villa Highlands ever present a motion to the Court or otherwise make any argument contesting the validity of the appraisal process or the umpire's decision, in keeping with the statement by Villa Highlands' counsel that they were not "attacking" the appraisal process.

Moreover, Villa Highlands has no excuse for not asserting any motion before the court contesting or seeking judicial clarification regarding the proper elements to be included in the appraisal process under the Policy prior to the close of trial. After all, Villa Highlands asserted its claim for declaratory relief in December 2006, eighteen months prior to trial. In the final analysis, Villa Highlands waived any right to assert any triable issue with regard to the appraisal process when it entered its stipulation regarding damages on the first day of trial and failed to present any motion to the Court regarding the appraisal process prior to the close of trial.

2. Any Issues Regarding the Appraisal Process were Rendered Moot by the Jury's Decision

Once again, the import of Villa Highlands' participation in the appraisal process under the Policy was to reach a final determination regarding Western Community's loss payment obligations under the Policy. In fact, Western Community submits that the real importance behind the District Court's order that the appraisal be completed prior to trial was the fact that the extent of Villa

Highlands' damage claims for trial could not be determined until all of the values that went into the underinsurance calculation had been fixed.

Since the stipulated amount of Villa Highlands' loss was \$3,967,157 (per agreement of counsel) and Western Community paid \$3,127,207 of that loss (due to the application of the "need for adequate insurance" provision), the amount of Villa Highlands' damage claim at trial was \$839,950. However, the jury found that Villa Highlands was not entitled to any damages at trial. Therefore, regardless of Villa Highlands' arguments regarding what should or should not have been included in the appraisal process or the correctness of the umpire's decision, its damage claims have already been fully adjudicated with the jury finding that Villa Highlands was not entitled to damages, a result Villa Highlands does not appeal. Any further issues with the appraisal have now been rendered moot.

3. Villa Highlands is not Entitled to Challenge the Appraisal Process under the Policy

Villa Highlands also asserts that it was entitled to seek a determination from the District Court that the umpire's decision under the appraisal process should be set aside. However, none of the language in the Policy itself provides a basis for an insured to challenge the umpire's decision. Under the procedure set forth under the Policy, the umpire's decision is final and "binding." Villa Highlands never raised an issue prior to the close of trial that the provisions of the Policy regarding the appraisal process were ambiguous, violated any provision of Idaho law or were against public policy.

Villa Highlands argues that there is legal authority supporting the proposition that an appraisal award may be judicially challenged. *See, e.g., Central Life Ins. Co. v. Aetna Casualty &*

Surety Co., 466 N.W.2d 257, 260 (Iowa 1991); *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. Ct. App. 1996). However, in both of these cases, the issue regarding the binding effect of an umpire's decision was the central case and controversy asserted in the action and the parties to both suits specifically requested that the court resolve certain issues regarding the appraisal process of umpire's decisions.

In this case, Villa Highlands neither asserted a declaratory judgment action nor raised any motion asking the Court to judicially determine which elements were to be included in the appraisal process or to vacate the umpire's decision prior to the close of trial and the court's dismissal of the declaratory action. Once again, Villa Highlands' claim for declaratory relief merely requested that the Court determine its rights and obligations under the insurance contract. The court made this determination by declaring that the term "value" under the Policy was defined as "actual cash value" and by declaring that the parties were to engage in and complete the appraisal process.

At no time prior to the Court's dismissal of the declaratory relief claim did Villa Highlands inform the Court that it was seeking the Court's further declaration that the appraisal process or umpire's decision were flawed and should be set aside. As set forth above, the District Court stated its understanding that the umpire's decision would be final and binding and would result in the conclusion of the declaratory judgment action. *Tr.*, April 9, 2008, p. 75. Villa Highlands never objected to the Court's reasoning and certainly did not inform the Court that there were remaining issues or controversies to be decided under the declaratory judgment action prior to the close of trial.

Finally, Western Community notes that it is patently clear as to why Villa Highlands waited until its motion for relief from judgment to ask the District Court, for the first time, to vacate the

umpire's decision. It had affirmatively chosen to litigate its entitlement to the \$840,000 difference between the loss and the amount paid by Western Community for the claim at trial under the argument that it was underinsured was due to Mr. Zimney's negligence, for which Western Community was vicariously liable. After putting all of its apples in this basket and losing at trial, Villa Highlands sought once again to revise its litigation strategy in an effort to recover money from Western Community that it was not able to recover at trial.

As the litigation history presented above clearly demonstrates, Villa Highlands has consistently demonstrated a proclivity for utilizing "convictions of convenience," which involved shifting its legal theories and arguments during the course of this proceeding to suit its desires. Its arguments on appeal regarding Count Six of the Second Amended Complaint comprise yet another attempt to change positions when not satisfied with its previous litigation strategy or the judicial outcome of that strategy. Western Community asserts that this Court should not provide an avenue for Villa Highlands to extend these proceedings merely because it was unsuccessful procuring the remedy it specifically sought at trial.

C. The Trial Court Properly Utilized its Discretion in Denying Villa Highlands' Motion to Vacate the Trial and/or Extend Deadlines

Villa Highlands asserts that the circumstances and timing of Davison Copple's withdrawal from the case warranted the District Court vacating the trial and extending the deadlines of the case. Villa Highlands' counsel argues that it was prejudiced in having insufficient time to prepare a complex case for trial due to the District Court's refusal to vacate the trial date and extend several deadlines. Further, Villa Highlands claims that the Court allowed proceedings to continue during the

20 day time period following the entry of its order allowing withdrawal of counsel in violation of Rule 11(b)(3).

Idaho appellate courts review a district court's denial of a motion to vacate trial under an abuse of discretion standard, *Gubler v. Boe*, 120 Idaho 294, 296, 815 P.2d 1034, 1036 (1991), and will analyze if the trial court knew it had the discretion, acted within the parameters provided to it and demonstrated an exercise of reason. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (quoting *Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 188-89, 879 P.2d 1120, 1121-22 (1994)).

When the District Court entertained Davison Copple's Motion to Withdraw on March 12, 2008, the Court noted that, if the trial were to be re-set in the matter, it would take at least one year before the case could be tried, a result that was unfair to the Defendants, who had already been engaged in the defense of the matter for eighteen months. *Tr.*, March 12, 2008, p. 4. The District Court immediately recognized the difficulty in allowing withdrawal close to trial. *Id.*, pp. 4-5. The court also noted recognized that the withdrawal of Davison Copple from the case was due to circumstances of Villa Highlands' own making, i.e., Bill Hodges simply wanted to part ways with his own attorneys in the case. *Id.*, pp. 5-6.

Due to the fact that Villa Highlands' response to Western Community's Motion for Summary Judgment would be due during the twenty day period after the Court entered the order on the Motion to Withdraw, it extended the hearing date on summary judgment motion from March 26th to April 9th. *Id.*, pp. 6-7. During the hearing, the Court also allowed the parties to extend the expert discovery deadline until April 18th. *Id.*, pp. 10-11.

It appears that Villa Highlands is claiming that the extensions of the summary judgment hearing date and expert discovery deadlines violated the provisions of Rule 11(b)(3) whereby no proceedings should occur in a case during the twenty day period of time in which the newly unrepresented party may seek to obtain new counsel or enter an appearance on its own behalf. However, it is clear that the Court's actions, which occurred during the hearing on the Motion to Withdraw and not during the twenty day period after the signed order was issued, were not in violation of Rule 11(b)(3). In fact, the Court's ruling inured to Villa Highlands' benefit, ensuring that new counsel for Villa Highlands would have an opportunity to file a response to the pending summary judgment motion and have time to take expert depositions prior to trial.

Further, the court properly exercised its discretion in denying Perkins Coie's Motion to Vacate, when presented during the April 9, 2008 hearing. Counsel's primary concern with regard to the Motion to Vacate was the ability to complete witness and expert depositions. *Tr.*, April 9, 2008, pp. 126-127. The court responded to this concern by granting an additional week to complete discovery, until April 25th. *Id.*, pp. 128-129, 133-134. The court also noted that it would be willing to hear motions in limine all the way up to the morning of trial. *Id.*, p. 134.

Clearly, the circumstances which allegedly required the remedy of vacating the trial were of Villa Highlands' own making rather than reasonable necessity. The trial court was merely unwilling to force the Defendants to wait another year to try the case when the only reason for the delay was because Mr. Hodges of Villa Highlands was not happy with Davison Copple's representation and wanted to procure new counsel one month before trial. Further, as is clear from Perkins Coie's argument during the April 9th summary judgment hearing, the renewed Motion to Vacate was really

an attempt by counsel to undo the Second Amended Complaint and completely re-start the litigation in the manner new counsel wanted it framed and litigated.

Therefore, the Court's decision did not merely reflect a determination that a trial delay of one year or more would be unfair and prejudicial to the Defendants, but also that Villa Highlands was not entitled to utilize the motion as a means to "re-start" the litigation and take it into a new direction when the parties were already in the last stages of preparing for trial based on the status of the pleadings at the time Davison Copple withdrew from the case.

D. Villa Highlands' Argument Regarding its Entitlement to Present Evidence of Consequential Damages at Trial has been Rendered Moot

Villa Highlands argues that the trial court abused its discretion when it refused to allow it to introduce evidence regarding its entitlement to consequential damages at trial. Idaho appellate courts review a trial court's decisions admitting or excluding evidence under the abuse of discretion standard." *Morris v. Thomson*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997). An incorrect ruling only warrants a new trial if the error affected a substantial right of a party. *Id.* (citing *I.R.C.P. 61; I.R.E. 103*).

The issue of Villa Highlands' right to present evidence of consequential damages at trial was discussed at length during hearings before the District Court on April 17, 2008 (*Tr.*, April 17, 2008, pp. 141-174, continued hearing on Motions for Summary Judgment), on April 28, 2008 (*Tr.*, April 28, 2008, pp. 179-194, hearing on Plaintiff's Motion to Reconsider), and on May 5, 2008 (*Tr.*, May 5, 2008, pp. 31-42, hearing on Western Community's Motion in Limine). Ultimately, the Court refused to allow Villa Highlands to present this evidence at trial because it was not timely disclosed to Defendants under the Court's scheduling order.

Western Community asserts that the District Court properly refused this item of evidence, especially since Villa Highlands never provided a response to Western Community's discovery requests regarding evidence in support of consequential damages. Furthermore, the claim to consequential damages ran contrary to Bill Hodges' own deposition testimony where he indicated that the damages being sought in the matter were limited to the \$840,000 difference between the amount of the claim and the amount Villa Highlands was paid by Western Community. *Tr.*, April 16, 2008, pp. 29-32.

Rather than laying out the full procedural history regarding the consequential damages issue in the context of this briefing, Western Community would note that this issue may be resolved on a rather simple basis. Since Villa Highlands' tort and contract claims were fully tried before a jury and the jury determined that Villa Highlands was not entitled to any damages in this matter, any alleged error in the District Court's decision not to allow evidence of consequential damages is not material enough to warrant reversal and a new trial. The evidence regarding consequential damages would not have gone to the liability issues decided by the jury. Thus, presentation of this evidence would not have affected the ultimate outcome of the trial. The issue of whether Villa Highlands should have been able to present consequential damage evidence at trial has been rendered moot by the jury's decision and is, therefore, a frivolous issue on appeal.

E. The District Court Correctly Denied Villa Highlands' Motion to Compel Since there were no Direct Breach of Contract Claims Asserted against Western Community

Villa Highlands asserts that it was entitled, two weeks prior to the start of trial, to procure new discovery regarding the underwriting process for its insurance policy and the manner in which Western Community investigated and adjusted the loss at issue. This issue was initially raised in

front of the District Court on Villa Highlands' Motion to Compel a 30(b)(6) deposition of Western Community, the deposition of Clayton Brumett (the claims adjuster who handled Villa Highlands insurance claim) and Rodney Saetrum (Western Community's attorney who also was involved in handling the insurance claim). See *COE* 33 (Plaintiff's Motion to Compel); *COE* 35 (Memorandum in Support of Western Community's Motion for Protective Order); *COE* 36 (Affidavit of Robert A. Anderson in Support of Motion for Protective Order).

A trial court's decision to grant or deny a motion to compel will not be disturbed on appeal unless there has been a clear abuse of discretion. *Kirk v. Ford Motor Co.*, 141 Idaho 697, 700-01, 116 P.3d 27, 30-1 (2005).

With respect to the issue of Western Community's underwriting process which preceded the issuance of the Builder's Risk policy at issue, *Tr.*, April 16, 2008, pp. 64-66, Western Community took the position that it was not relevant to any claims against it under the Second Amended Complaint (especially since the only remaining claims against it were based on vicarious liability) and that Villa Highlands was merely attempting to engage in a fishing expedition on the eve of trial in an attempt to once again shift its litigation strategy. *Id.*, 69-71.

The Court noted to Villa Highlands during the hearing that discovery in the case should have been long completed. *Id.*, p. 80. The Court allowed Villa Highlands to review the underwriting file to determine if the file contained any communications between Dale Zimney and Western Community which may have been relevant to the amount of insurance requested in Villa Highlands' application. *Id.*, pp. 82-83. However, the Court would not allow Villa Highlands to procure extensive discovery concerning Western Community's underwriting process, especially since there

were no claims under the Second Amended Complaint relating to the manner in which Western Community created the Policy. *Id.*

Concerning Villa Highlands' request to depose Western Community adjusters and underwriters in the weeks before trial, *See COE* 33 (Plaintiff's Motion to Compel), the Court correctly noted that further discovery of the manner in which Western Community adjusted the claim was irrelevant since the parties had stipulated to the amount of the loss. *Tr.*, April 16, 2008, p. 91. Further, the District Court questioned why Villa Highlands did not attempt to depose these individuals during the previous 16 months the parties had been litigating the case. *Id.*, p. 93. Ultimately, however, the Court found that the depositions of Western Community's adjusters and underwriters was not relevant to claims asserted against Western Community and that it appeared that Villa Highlands was seeking a means to support a bad faith claim that was not at issue in the case. *Id.*, pp. 94, 100-101.

The District Court clearly acted within its discretion in denying Villa Highlands' eve of trial attempt to conduct extensive discovery regarding Western Community's underwriting and loss adjustment process related to Villa Highlands' policy and loss. As the Court noted, Villa Highlands had the full opportunity to conduct this discovery when there were breach of contract and bad faith claims pending against Western Community under the Amended Complaint. However, rather than seeking that discovery, Villa Highlands chose to drop those claims under the Second Amended Complaint and pursue Western Community on a vicarious liability basis.

The Court's ruling on Villa Highlands' Motion to Compel was merely an attempt to hold Villa Highlands to its pleadings and prevent it from once again attempting to expand the scope of


litigation and shift its litigation strategy in the weeks before trial. Therefore, the Court's decision should be upheld.

IV. CONCLUSION

For all of the foregoing reasons, Western Community respectfully request that this Court affirm the District Court's various rulings at issue in this appeal and grant Western Community its attorney fees and costs incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 16th day of April, 2009.

ANDERSON JULIAN & HULL LLP


By Robert A. Anderson
Robert A. Anderson, Of the Firm
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 2009, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Richard C. Boardman
Cynthia Yee-Wallace
PERKINS COIE LLP
251 East Front Street, Suite 400
P.O. Box 737
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☐ U.S. Mail, postage prepaid
☒ Hand-Delivered
☐ Overnight Mail
☐ Facsimile



Robert A. Anderson

APPENDIX A

FILED

NO. _____
FILED A.M. _____ P.M. 4:00

AUG 26 2008

J. DAVID NAVARRO
COURT CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

VILLA HIGHLANDS, LLC, an Idaho
limited liability company,)

Plaintiff,)

vs.)

WESTERN COMMUNITY INSURANCE)
CO., an Idaho limited liability company,)
FARM BUREAU MUTUAL INSURANCE)
COMPANY OF IDAHO, an Idaho)
Corporation; DALE E. ZIMNEY; and)
DOES 1-V,)

Defendants.)

Case No. CV OC 0621175

DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR
RELIEF FROM JUDGMENT

Before the court for decision is Plaintiff's Rule 60(b)(6) Motion For Relief From Judgment. Hearing was held on this motion on August 20, 2008. Richard Boardman and Cynthia L. Yee-Wallace appeared on behalf of plaintiff, with Mr. Boardman arguing. Robert Anderson appeared and argued on behalf of Defendant Western Community Insurance, Co. Karen Sheehan appeared on behalf of defendant Dale E. Zimney.

FACTS AND PROCEDURAL BACKGROUND:

This case arose out of a builder's risk insurance policy purchased by Plaintiff Villa Highlands to cover the Villa Highlands' building during construction. In purchasing the policy, Villa Highlands dealt with Dale Zimney (Zimney), an insurance agent for Western Community Insurance Company (Western Community) and Farm Bureau Insurance Company (Farm Bureau). The policy itself was issued by Western Community. Unfortunately, midway through

construction, the building caught fire and was destroyed. During the adjustment process, it was discovered that Villa Highlands may have been under-insured, triggering a reduction in benefits for the loss Villa Highlands suffered. In response to this, Villa Highlands, on November 13, 2006, filed this lawsuit requesting damages and also seeking declaratory relief—asking the court to determine the rights of the parties under the written insurance contract.

More than a year later, in December 2007, Western Community motioned the court to compel appraisal as contemplated under the insurance contract. In February and March of 2008, all parties moved for summary judgment.

On April 9, 2008, the court, in a ruling from the bench, denied Villa Highlands' motion for summary judgment, granted Zimney's motion only as to the breach of a special relationship claim, and granted Western Community and Farm Bureau's motion only to the extent of dismissing Farm Bureau as a defendant. All other claims, including the request for declaratory relief, remained. In regard to Western Community's motion to compel appraisal, the court told both parties that they needed to quickly get their appraisals and complete the appraisal process before trial. (Hr'g Tr. 75-76, Apr. 9, 2008.)

During the April 9th hearing, the court declared that the term "value" in paragraph f.2 of the policy unambiguously meant "actual cash value," which was to be determined by replacement costs. (Hr'g Tr. 66.) The court did not decide the date to use for valuing the property because the parties had already agreed on using the date of completion and recognized that they were to come to an agreement as to that date. (Hr'g Tr. 81-85.) In addition, the court did not decide the issue of what costs should be included or excluded to determine the value because counsel for Villa Highlands stated that the issue was something for the parties to work out.¹ (Hr'g Tr. 71-72.)

Although not raised before the April 9th hearing, Villa Highlands indicated that it was not clear as to how the appraisal process worked, so the parties discussed the issue with the court at that time. The court concluded that, under the terms of the contract, both the insured and the insurance company were to get independent appraisals and, in the event that the appraisals did not match, to then submit those appraisals to an independent umpire to make a decision as to which appraisal determines the value. (Hr'g Tr. 73-76, Apr. 9, 2008.) As the court interpreted the

¹ Mr. Boardman informed the court, "We then move on to still some thorny issues about what goes into an appraisal. The problem with these appraisals that have already been done, Judge is they include, as I call them, uninsurable items but I think that is for us to work out with whom ever." The court responded, "Well you're going to have to get it done before the trial. I'm not going to reset your trial."

contract, the umpire's decision, once issued, would be final, and nothing would be left for the court, or a jury, to decide. (Hr'g Tr. 75, Apr. 9, 2008.)

In additional hearings on April 16 and 17, 2008, the court noted that the claim for declaratory action was not completely gone but was gone to the extent of the court's determination that "the value on the date of completion is the actual cash value." (Hr'g Tr. 56, 58, Apr. 16, 2008; Hr'g Tr. 2, Apr. 17, 2008.) The court concluded, "Villa Highlands requested the court to determine the right to liabilities of the parties in that count, and . . . the court has looked at how the contract is to be interpreted and those decisions have been made relative to the Dec action." (Hr'g Tr. 2, Apr. 17, 2008.) Villa Highlands did not ask the court to make any further ruling as to Villa Highlands' rights and obligations under the terms of the contract prior to the dismissal of the declaratory action.

Then during a hearing on April 28, 2008, the court stated its understanding that the declaratory action would go away once the parties obtained two matching appraisals or had an umpire determine the "value" for the purpose of calculating the amount the insurance company owed. Neither party objected to this understanding. (Hr'g Tr. 13, April 28, 2008.) The court stated, "I understand the Dec action should go away once you get the umpire to determine—or [you get] two appraisals [that match]. Then we know what that amount [of damages] is." (Hr'g Tr. 13, Apr. 28, 2008.) Villa Highlands did not make any objection to the court's understanding of the appraisal process or the binding nature of the umpire's decision.

On April 29, 2008, the court entered a written order as to its April 9th rulings on the summary judgment motions. In regard to Plaintiff's claim for declaratory action against Western Community under Count Six of the Second Amended Complaint, the court held only that the insurance policy was clear and unambiguous in its terms. (Order on Def. Western Community and Farm Bureau's Mot. Summ. J. 3.) The court did not determine whether Plaintiff was entitled to relief and stated that whether the claim was to be dismissed was "to be determined after the appraisals." (*Id.*)

On May 1, 2008, Villa Highlands and Western submitted their respective appraisals to an umpire. Villa Highlands submitted the appraisal completed by Integra in September 2006. Western submitted a modified appraisal, the Supplemental Addendum to Appraisal Report, completed by Mountain States on April 30, 2008. On May 2, 2008, the umpire asked the parties for a definition of "cash value" and received a letter stating that it was "actual cash value," that it did not include certain types of items, and that the umpire should refer to pages 68-69 of the April 9th hearing transcript for court's ruling as to the term "value." (Villa Highlands argues that

in agreeing to send the letter, "it was not waiving its right to argue that other items should not be included in the valuation reports.")

On May 4, 2008, one day before trial began, the umpire sent a letter to the parties with his finding that Mountain States appraisal was more reliable. The Mountain States appraisal established that the value was greater than what Western Community had originally established the value to be²—affirming that Villa Highlands was in fact underinsured according to the policy. On May 5, just before trial began, Ms. Yee-Wallace, counsel for Villa Highlands, stated that her client was "not attacking the appraisal process" at this point or the number (representing the "value" under clause f.2 of the contract) "for purposes of this trial." She also stated that her client was not waiving its right to challenge the appraisal on appeal. Nevertheless, the parties stipulated to the amount of damages sought at trial, and that stipulation was entered on May 6, 2008. (Order on Def. Western Community's First Mot. in Limine 3.)

The case was tried to a jury from May 5, 2008 through May 13, 2008. The jury awarded no damages to Villa Highlands. No issues under the declaratory action were submitted to the jury. On May 27, 2008, the court ordered that all claims, including the claim for declaratory relief, against Western Community be dismissed with prejudice based on its understanding that no controversy remained.

PLAINTIFF'S ARGUMENTS:

Villa Highlands argues that the court should grant it relief from the order dismissing count six of the Amended Complaint because "the declaratory action was not concluded or fully determined." In paragraph thirty-four of the complaint, Villa Highlands asked the court to declare "the relative rights and obligations of the parties" under the insurance policy and to "determine that Villa Highlands is entitled to the payment of the full amount due and owing pursuant to the Policy without reduction, offset, or reduction in any manner." Villa Highlands argues that although the Court declared that the term "value" means "actual cash value," the court made no other declaration before dismissing the claim.

According to Villa Highlands, the problem is that the parties were not able to reach an agreement on a more extensive definition of value and exactly what items may be considered as "replacement costs." Mr. Boardman told the court that he hoped the parties could reach an agreement, but on the eve of trial, the parties did not agree on how to classify all types of

² Western originally determined that the value of the building was at least \$7.1 million. The modified Mountain States appraisal determined that the value of the building was \$8.3 million.

building costs. Instead, the parties agreed to the exclusion of some costs from being considered "replacement costs" and informed the umpire of that which they agreed on.

Villa Highlands argues that the Supplemental Addendum to Appraisal Report, which the umpire determined to be the more reliable appraisal, included arguably uninsurable items not covered by the policy, causing the appraisal to result in a higher value than was appropriate.³ In addition, it argues that the Supplemental Addendum contained significant errors and mistakes.⁴

Villa Highlands asks the court to set aside the umpire's findings because the findings of the umpire, Mr. Langston, are not in compliance with the terms of the Builder's Risk policy and because Mr. Langston's Limited Appraisal Review was based on significant mistakes and errors. In support of this request, Villa Highlands uses case law from Texas and Iowa to argue that the court may overturn an appraisal award in three situations: (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract. *Wells v. American States Preferred Ins. Co.*, 919 S.W. 2d 679, 683 (Tex. Ct. App. 1996); *see also Central Life Ins. Co. v. Aetna & Surety Co.*, 466 N.W.2d 257, 260 (Iowa 1991). (Idaho does not have any case law on point.)

DEFENDANT'S ARGUMENTS:

Western Community argues that Villa Highlands' claim for declaratory judgment had been fully resolved or rendered moot by the time trial commenced because an umpire had made a final determination in the appraisal process. In support of this argument, Western Community points to statements made by the court during the hearings in April demonstrating the understanding of the court and the parties that the declaratory action was gone to the extent that

³ Western Community stated previously that motion sensors, alarms, consequential damages, additional security, contingency funds, construction fences, and the cost of project managers are not covered in the policy and should be excluded in valuing the building. However, all of these costs were included in the Supplemental Addendum. Other soft costs were also included in the Supplemental Addendum. Many of the items listed under "general conditions" in the Petra 2006 Estimate include uninsurable costs such as: labor, surveying, inspection fees, rental equipment, contractor's profit, and architectural fees. Other costs, such as sitework and signage, were included in the Petra 2006 estimate but are expressly not covered by the policy (see paragraph A.2.b(3)). These items were originally included in the Petra 2006 because Western Community asked Villa Highlands to submit the cost to reconstruct the entire project for purposes of determining the amount of the loss after the fire. The Petra 2006 estimate was never intended to reflect the value of the building for purposes of an underinsurance determination, much like James Brown appraisals were not conducted for such determinations. Western Community simply attached the Petra 2006 Estimate to a spreadsheet and had their appraisal stamp it with approval in order to make it qualify as an appraisal under the policy. Mr. Langston's findings based on this Addendum were improper, and should be vacated.

⁴ For instance, the Mountain States Appraisal computes valuations using the square footage of the Villa Highlands land, which is 71,308. However, the square footage of the Villa Highlands building was 62,830. Also, the Mountain States Appraisal used a completion date of June 1, 2007, which is unsupported by any evidence in the record.

the court had made interpretations of the insurance policy and implying that the action would be gone when the umpire reached a decision and Villa Highlands was paid accordingly. Before and during trial, Villa Highlands neither indicated that the declaratory action would survive nor advanced an argument that it had a right to appeal the umpire's decision. In addition, Villa Highlands ratified the appraisal process by stipulating to damages. Based on Villa Highlands' silence and stipulation, Western argues that the court's dismissal of the declaratory action was appropriate.

Western Community also argues that the insurance contract does not give Villa Highlands a right or opportunity to appeal the umpire's decision and that to give Villa Highlands that opportunity would allow it to make arguments not advanced at trial or within the scope of the pleadings. More specifically, Western Community argues that Villa Highlands' motion is an attempt to bring a breach of contract claim under a new legal theory.

STANDARD OF REVIEW:

Idaho Rule of Civil Procedure 60(b)(6) provides that a party may motion the district court to grant relief from judgment on the grounds that there is any "reason justifying relief from the operation of the judgment." This catchall provision does not permit the court to reconsider the legal basis for its decision, and the moving party may not use it to present newly discovered legal theories. *First Bank & Trust of Idaho v. Parker Bros., Inc.*, 112 Idaho 30, 32 730 P.2d 950, 952 (1986). Instead, the moving party "must demonstrate unique and compelling circumstances justifying relief." *Matter of Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App.1990).

ANALYSIS:

The underlying issue is whether it was appropriate for the court to dismiss the declaratory action upon completion of the trial or whether a controversy over the interpretation of the Policy remained such that a declaratory judgment needed to be rendered. For a party to obtain declaratory relief, there must be a justiciable controversy. *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984).

Villa Highlands claims that the declaratory action had not been resolved and was therefore improperly dismissed. To support this claim, Villa Highlands points to the language in the April 28, 2008 order where the court stated it would later determine the claim for declaratory relief and then contrasts that language with the May 27, 2008 order where the court instead

dismissed the claim. However, the court's intent by the April 28, 2008 order was to require completion of the appraisal process required by the parties under the contract. Once that was done, there would be no remaining issues.

Despite the fact that the declaratory action was not dismissed until after the trial and a year and a half after filing, Villa Highlands never made the court aware of any remaining controversy that needed to be decided by the court. Although Villa Highlands reserved the right to contest the appraisal process on appeal, at no point between the issuance of Mountain States revised appraisal on April 30, the umpire's decision on May 4, and the court's order on May 27 did Villa Highlands bring any motion before the court asking the court to vacate the umpire's decision and to declare what types of costs may be appropriately included in the appraisal under the terms of the insurance policy. Instead of bringing a motion asking the court to grant the relief requested under the declaratory action by declaring the appraisal process or umpire's decision invalid, Villa Highlands stipulated to the damages sought at trial, thereby rendering the appraisal process moot since the end result of the appraisal process would otherwise have been the basis for determining damages. On May 22, Villa Highlands did object to Western Community's proposed judgment on the grounds "that not all claims pending against Western Community have been dismissed with prejudice," but Villa Highlands did not explain what claims or controversies remained for the court to decide. (Pl.'s Objection to Proposed J. Submitted by Western Community 2.)

Only when Villa Highlands brought the motion for relief from judgment was the court made aware that Villa Highlands wanted to contest the appraisal process and the umpire's decision. In support of its motion, Villa Highlands argues that the court has the authority to overturn an umpire's decision on the basis of two cases, one from Iowa and the other from Texas. See *Central Life Ins. Co. v. Aetna & Surety Co.*, 466 N.W.2d 257 (Iowa 1991); *Wells v. American States Preferred Ins. Co.*, 919 S.W. 2d 679 (Tex. Ct. App. 1996). But besides the fact that these cases are not binding precedent, those cases are distinguishable from the present case because unlike this case, the issue of whether an umpire's decision should be held binding or vacated was the central case and controversy brought before each district court. The parties in the Iowa and Texas cases were specific in their claims and motions in asking the courts to resolve issues regarding the appraisal processes and the umpires' (or appraisal panel's) decisions.

In the Iowa case, the insurer filed a declaratory action asking the court to vacate the umpire's award, and the insured filed an action seeking enforcement and damages for a bad faith refusal to pay the award. *Central Life Ins. Co.*, 466 N.W.2d at 259. The district court upheld the

umpire's appraisal award on summary judgment, but the Iowa Supreme Court decided that the umpire's decision was null and void because the umpire had a pecuniary interest in the outcome of his decision. *Id.* at 259, 262. The relevant fact for this case is that the validity of the umpire's decision was an issue specifically raised in the declaratory action, the counterclaim, and the summary judgment motions.

In the Texas case, the insurer brought a suit for declaratory judgment asking the court to declare that the appraisal process had been properly invoked and to require the insured to submit its claim to appraisal; the insured filed a counterclaim and other causes of action. *Wells*, 919 S.W. 2d at 681-82. On motions for summary judgment, the district court ruled that the appraisal award was binding. *Id.* at 682. The Court of Appeals of Texas found as a matter of law that the appraisal panel improperly determined the cause of damage and ruled that whether the appraisal value, as determined by the appraisal panel, could be awarded depended on what was found to be the cause of damage at trial. *Id.* at 685-86. Like the Iowa case, the decisions in the case revolved around the validity of the appraisal panel's decision as specifically raised in the complaint, the counterclaim, and the summary judgment motions.

Central Life Ins. and *Wells* are distinguishable from this case because Villa Highlands did not bring a declaratory action or any motion asking the court to vacate the decision of the umpire until the trial was over and the court had dismissed the declaratory action. Instead, Villa Highlands brought a declaratory action asking the court to determine its rights and obligations under the contract, and the court did that. The court determined that "value" is "actual cash value" and determined that the parties were to engage in the appraisal process. At the time the declaratory action was dismissed, the court was unaware of any dispute between the parties that remained and needed to be decided by the court in regard to the way that the appraisal process was conducted. Furthermore, the court understood the decision of the umpire to be binding, and the parties did not bring any motion challenging the binding nature of the umpire's decision.

Prior to the umpire's decision, neither Villa Highlands nor Western contested the court's understanding that the umpire's decision would conclude any declaratory action because no case or controversy would remain. After the umpire rendered a decision, and on the eve of trial, Villa Highlands informed the court that it was reserving the right to contest the appraisal process *on appeal* and was not contesting it for the purpose of trial, but Villa Highlands did not tell the court that there were remaining issues or controversies that needed to be decided *by the district court in the current suit*. In fact, instead of informing the court that a controversy or issue remained for the court to decide, Villa Highlands stipulated to the amount of damages that resulted from the

underinsurance. Thus, when the trial was over, the court believed that no controversy remained to be decided under the declaratory action and dismissed Count Six of the Second Amended Complaint—the request for declaratory relief.

There are two problems with Villa Highlands' motion for relief from judgment. First, Villa Highlands is essentially asking the court to use a relief from judgment motion to vacate an umpire's decision. Just as the court cannot reconsider the legal basis for its decision on this motion, so it cannot reconsider whether the umpire's decision had an appropriate legal/contractual basis when the issue had not been previously presented to the court. *See First Bank & Trust of Idaho, Inc.*, 112 Idaho at 32.. Second, Villa Highlands is essentially seeking to recover money from Western Community that it was not able to recover at trial by bringing a new claim that the appraisal process did not work. Had the appraisal process been completed and Villa Highlands obtained a determination that its appraisal gave the correct value, the claims tried to the jury would have been unnecessary. After trial is not the time to contest an appraisal process—to bring a new legal theory before the court—that has the potential to impact what damages were sought at trial. *See id.*

By not filing a timely motion to contest the appraisal process and by waiting to raise the issue until the filing of this Rule 60(b) motion, Villa Highlands cannot now be heard on this issue. Although Villa Highlands is now claiming there may have been problems in the appraisal process, those issues should have been resolved before the jury trial. That Villa Highlands failed to take action and present a justiciable issue before the judgment was entered is not a unique and compelling circumstance justifying relief from the judgment. *Matter of Estate of Bagley*, 117 Idaho at 1093.

Plaintiff's motion to grant relief from judgment is therefore DENIED.

IT IS SO ORDERED.

Dated this 26th day of August, 2008.



Darla Williamson, District Judge

I hereby certify that on this date I mailed a true and correct copy of the foregoing

to:

Richard C. Boardman
Cynthia Yee-Wallace
251 E. Front Street, Ste 400
Boise, Idaho 83702

Karen Sheehan
P.O. Box 1271
Boise, Idaho 83701

Robert A. Anderson
P.O. Box 7426
Boise, Idaho 83707-7426

Dated this 9th day of August, 2008


Janine Korsen, Deputy Court Clerk

APPENDIX B

Robert A. Anderson, ISB No. 2124
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
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Facsimile: (208) 344-5510
E-Mail: raanderson@ajhlaw.com

Attorneys for Defendant/Counterclaimant
Western Community Ins. Co. and
Defendant Farm Bureau Mut. Ins. Co.
of Idaho

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

VILLA HIGHLANDS, LLC, an Idaho limited
liability company,

Plaintiff,

vs.

**WESTERN COMMUNITY INSURANCE
CO.**, an Idaho corporation; **FARM
BUREAU MUTUAL INSURANCE
COMPANY OF IDAHO**, an Idaho
corporation; **DALE E. ZIMNEY**; and **DOES
I-V**,

Defendants.

Case No. CV OC 0621175

**STIPULATION RE: VILLA
HIGHLANDS APPRAISAL**

NO. _____
A.M. _____ P.M. _____
FILED _____

JAN 17 2008

J. DAVID NAVARRO, Clerk
By **J. EARLE**
DEPUTY

COPY

**WESTERN COMMUNITY INSURANCE
CO., an Idaho corporation,**

Counterclaimant,

vs.

**VILLA HIGHLANDS, LLC, an Idaho limited
liability company,**

Counterdefendant.

COMES NOW the Plaintiff, Villa Highlands, LLC and Defendants, Western Community Insurance Company and Farm Bureau Mutual Insurance Company of Idaho, by and through their counsel of record, and stipulate and agree that, for purposes of this litigation, the following values will be utilized, appraising the fair market value of the covered property at issue and the cost of repair of the damaged property:

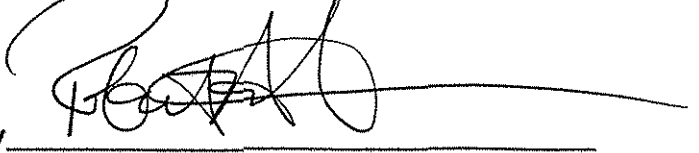
1. The fully appraised fair market value of the subject building on the date of completion including, but not limited to and inclusive of, factors such as entrepreneurial profit, soft costs and hard costs under §§ A(1) and F(2) of Villa Highlands' Builder's Risk Policy, shall be calculated as: \$7,580,000;

2. The amount of the loss (repair/replacement cost), under §§ E(4) and F(2) of Villa Highlands' Builder's Risk Policy, shall be calculated as: \$3,967,157.00.

The parties also agree that this stipulation otherwise satisfies the appraisal conditions set forth in § (E)(2) of Villa Highlands' Builder's Risk Policy.

DATED this 16th day of January, 2008.

ANDERSON, JULIAN & HULL LLP



By _____

Robert A. Anderson, Of the Firm
Attorneys for Defendant/Counter-
claimant Western Community Ins. Co.
and Defendant Farm Bureau Mut. Ins.
Co. of Idaho

DATED this ____ day of January, 2008.

DAVISON, COPPLE, COPPLE & COX, LLP

By _____

Ed Guerricabeitia, Of the Firm
Attorneys for Plaintiff Villa Highlands,
LLC

DATED this ____ day of January, 2008.

ANDERSON, JULIAN & HULL LLP


By

Robert A. Anderson, Of the Firm
Attorneys for Defendant/Counter-
claimant Western Community Ins. Co.
and Defendant Farm Bureau Mut. Ins.
Co. of Idaho

DATED this 15th day of January, 2008.

DAVISON, COPPLE, COPPLE & COX, LLP

By


Ed Guerricabeitia, Of the Firm
Attorneys for Plaintiff Villa Highlands,
LLC